IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Writ Petition No.2502 of 1987

M/s.Shantilal Bhujbal-Vaidya,
a registered firm by Vahiwatdar
and Partner Shri Jaykumar Shantinath
Vaidya, resident of Baramati,
Dist. Pune. Petitioner

Vs.

1. Vasant Ramchandra Daskul,
since deceased by his heir:

(1A) Smt.Yamunabai Ramchandra Daskul:
Since deceased by her heir:

(1B) Smt.Prabhavaati Vasant Daskul

2. Vishnu Kashinath Barge,
Since deceased by his heirs & LRs:

(2A) Smt.Parvatibai Vishnu Barge
(2B) Dattoba Vishnu Barge Respondents

Mr. A. P.Kulkarni h/f. Mr. A. A. Kumbhkoni for petitioner.

Mr.S.G.Karandikar for Resp.No.1B.

Mr.L.S.Gaikwad for Resp.Nos.2A and 2B.

CORAM: B.H.MARLAPALLE,J.

July 06, 2006.

ORAL JUDGMENT:

1. One Ramchandra Ganpat Daskul was the owner of the agricultural land located in Survey No.91-A admeasuring 14 acres and 14 gunthas and Survey No.91-B admeasuring 11 acres and 12 gunthas in

village Baramati, Taluka Baramati. Ramchandra left behind him wife Yamunabai and son Vasant. Shankar Parasharam Ashtekar and Vishnu Kashinath Barge had claimed tenancy rights in respect of the land in Survey No.91-A admeasuring 14 acres and 14 gunthas, under the Bombay Tenancy and Agricultural Lands Act, 1948 (for short "the Tenancy Act"). Tenancy Application No.2 of 1958 was filed claiming such a right and it appears that the revenue authorities had allowed the said application. The landlords i.e. Vasant and Yamunabai approached this Court in Special Civil Application No.781 of 1961. The said petition came to be decided by a Division Bench of this Court in terms of the compromise between the parties on 10-1-1962. Ashtekar and Barge were respondents in the said petition and all the parties to the petition have placed on record the compromise purshis signed on 10-1-1962.

2. As per the order passed by the Division Bench of this Court on 10-1-1962 from the total land of 14 acres and 14 gunthas in Survey No.91-A, seven gunthas were to be left by way of common land marked by letters P, Q, R, S, T and U, for common amenities and the remaining area i.e. 14 acres and 7 gunthas was

to be divided equally between the landlords and the tenants i.e. Mr.Ashtekar and his partner Mr.Barge. It was further specifically stated by the Division Bench as under:

> "Opponent No.1 is to be the tenant of only the southern portion of the land. It is also agreed between the parties that opponent No.2 should be regarded as the partner taken by the Opponent No.1 and that he is in possession of the southern portion of the land with the consent of the petitioner."

The Division Bench further made it clear that the 1st Opponent i.e. Shankar Parasharam Ashtekar was not the tenant of the northern portion of the land partitioned by the Mamlatdar in the manner indicated in the compromise purshis and that he was declared to be the tenant only in respect of the southern portion of the land as determined by the Mamlatdar. The Division Bench further stated that the Opponent No.2 i.e. Barge's status as a tenant on the southern portion of the land was not decided.

3. In spite of the specific observations made by

the Division Bench in Special Civil Application No.781 of 1961 Mr.Barge filed an application under Section 70(b) read with Section 4 of the Tenancy Act before the Mamlatdar at Baramati and prayed for a declaration that he was a tenant in respect of the entire land in Survey No.91-A i.e. 14 acres and 14 Rs. This application was filed on or about 31/3/1962 and it came to be dismissed on 27/9/1963.

4. It appears, in the year 1965 there were parallel proceedings initiated by the landlords separately. An application under Section 29 read with Section 15 of the Tenancy Act came to be filed and registered as Tenancy Application No.23 of 1965 in respect of the southern portion of the land in Survey Nos.91-A for restoration of the said portion on the grounds that the tenant i.e. Ashtekar failed to pay the tenancy charges. On the other hand the landlords filed Regular Civil Suit No.131 of 1965 against Vishnu Barge praying for permanent injunction restraining him from obstructing the landlords in the cultivation of the northern portion of Survey No.91-A which came in possession of the landlords on account of the order passed by this Court on 10-1-1962. The landlords' Tenancy Application was allowed by the

Mamlatdar on 17/10/1966 but their Civil Suit came to be dismissed by the learned Civil Judge, Junior Division at Baramati on 30/3/1966. The tenants went in appeal before the Special Deputy Collector against the order of the Mamlatdar and the said appeal was dismissed on 31/3/1967 and, therefore, they approached the Maharashtra Revenue Tribunal which allowed the revision application on 31/7/1969 and held that the landlords were not entitled for restoration of the southern portion of the land in Survey No.91-A. At the same time the landlords had filed First Appeal No.300 of 1966 and prayed for permanent injunction in respect of the northern portion of the land in Survey No.91-A. This appeal was dismissed by the learned 4th Extra Assistant Judge at Pune on 29th September 1967. The landlords in these circumstances initiated two different proceedings before this Court. The order passed by the Maharashtra Revenue Tribunal on 31/7/1969 came to be challenged in Special Civil Application No.2589 of 1969 and the order dated 29/9/1967 dismissing the First Appeal by the 4th Extra Asst. Judge at Pune came to be challenged in Second Appeal No.98 of 1968 and Second Appeal No.1606 of 1969 was filed by Mr. Barge. The Special Civil Application No.2589 of 1969

came to be decided by this Court (Vaidya,J.) on 9th August 1972 and both the Second Appeals came to be decided by a common Judgment of the same learned Judge on 16th March 1974 and in both these proceedings the landlords failed.

5. The present petitioner is a partnership firm and it had filed Special Civil Suit No.371 of 1972 in the Court of Civil Judge, Senior Division at Pune against the landlords for recovery of an amount of Rs.42,564/- and the said Suit was decreed by the learned 4th Joint Civil Judge, Senior Division at Pune on 16/2/1973. However, prior to this decree by an interlocutory order dated 21/10/1972 the trial Court passed an order below Exhibit 5 in Special Civil Suit No.371 of 1972 and order of attachment before judgment of the agricultural lands in Survey Nos.91-A and 91-B was passed. The petitioner filed Special Darkhast No.84 of 1975 in the Court of the Civil Judge, Senior Division at Pune for execution of the decree passed on 16/2/1973. Order of warrant of sale as well as proclamation of both the lands were issued on 17/11/1984 and accordingly on 23/11/1984 the proclamation was issued. The present respondent no.2 i.e. Dattatraya Vishnu Barge, the LR of Vishnu

Kashinath Barge filed his reply in Special Darkhast No.84 of 1975 and opposed the same stating that the decree was not executable and he had become a tenant under the Tenancy Act and the rights were required to be decided by the revenue authorities and the decree would defeat the rights created in his favour under the Tenancy Act. He further claimed that though Special Civil Application No.781 of 1961 was decided by a Division Bench of this Court in terms of the compromise, the land in Survey No.91-A was never partitioned and the northern portion was not put in possession of the landlords and the said order of this Court remained as it is. By the subsequent order passed by this Court in Special Civil Application No.2589 of 1969 and Second Appeal No.98 of 1968, the earlier order passed in Special Civil Application No.781 of 1961 had become nullity and it ceased to have any effect recognising the landlords' holding on the northern portion of Survey No.91-A, as per the Respondent No.2.

6. By the impugned order dated 22/4/1986 the learned 6th Jt.Civil Judge, Senior Division at Pune rejected the decree holder's application and held that the Darkhast was unexecutable and disposed

accordingly. To decide this petition filed under Article 227 of the Constitution the moot question that requires to be decided is whether the present respondent no.2 had any rights in respect of the northern portion of Survey Nos.91-A and 91-B and if it is held that he was in possession and was in fact cultivating the said land (northern portion) as on the tiller's day i.e. 1/4/1957, the impugned order will have to be upheld.

7. Mr.Karandikar, the learned counsel appearing for the landlords has taken me through the above referred orders passed by this Court in three different proceedings right from 1962 to 1974 and also the order passed by the Maharashtra Revenue Tribunal on 31/7/1969 as well as the judgment and order in Regular Civil Suit No.131 of 1965 and First Appeal No.300 of 1966, in support of his contentions that the respondent no.2 had no claim whatsoever in respect of the northern portion of land and he was never in cultivation of any part of the said land so as to claim rights under the Tenancy Act. It was submitted that by way of the compromise purshis the status of the respondent no.2 was recognised as a partner of the original tenant Mr.Ashtekar on the

southern portion of the land in Survey No.91-A and even if the landlords' suit was dismissed and the said order was confirmed by this Court as well, the failure of the landlords to obtain an order of injunction would not by any stretch of imagination lead to a conclusion that the respondent no.2 or his predecessor was in possession or was cultivating any portion of the land on northern side in Survey No.91-A and the findings recorded by the executing Court in the impugned order are patently erroneous. Mr.Gaikwad, the learned counsel for the respondent no.2, on the other hand maintained that consequent to the order dated 10/1/1962 passed by a Division Bench of this Court, the land in Survey No.91-A was never partitioned and, therefore, the landlords were never put in possession of the northern portion of land admeasuring 7 acres and 7 gunthas at any time. In support of these contentions he relies upon the judgment and order dismissing Regular Civil Suit No.131 of 1965 and First Appeal No.300 of 1966 as well as the judgment of this Court in Second Appeal No.98 of 1968. As per Mr.Gaikwad the judgment in Second Appeal No.98 of 1968 conclusively proved that the landlords were never in possession of the northern portion of the land in Survey No.91-A and

the order passed by the Division Bench of this Court on 10/1/1962 was nullified by the order passed in Second Appeal No.98 of 1968 as well as Special Civil Application No.2589 of 1969. Mr.Gaikwad reiterated that the Maharashtra Land Revenue Tribunal in its judgment dated 31/7/1969 had recorded a finding that the respondent no.2 was in possession of the entire land in Survey No.91-A and not only the southern portion from the said Survey number.

8. It ought to be noted at the threshold that the order passed on 10/1/1962 in Special Civil Application No.781 of 1961 was passed by the Division Bench of this Court and no subsequent order of any Single Bench either in the Second Appeal or Special Civil Application would, in law, nullify or set aside or modify the same. As far as the status and the rights of the landlords and the original tenant Mr.Ashtekar as well as present Respondent No.2 are concerned, they were settled by the Division Bench order dated 10/1/1962 viz. Mr.Ashtekar was recognised as the tenant on the southern half of Survey No.91-A and the respondent no.2 was accepted as his partner for cultivation with the consent of the landlords. On the other hand, the landlords held

the northern portion of Survey No.91-A and the tenants would have no claim in respect of the same. In RCS No.131 of 1965 it was pleaded by the landlords that subsequent to the order dated 10/1/1962 passed by this Court, the Mamlatdar had partitioned the land in Survey No.91-A and the northern portion was put in their possession. The trial Court examined the evidence and noted that it was not Mamlatdar who had partitioned the land and it was in fact some lower rank officer who was examined as a witness and his testimony did not clearly indicate the boundaries of the land. The testimony of this witness was discarded on the ground that there was no conclusive proof that the land was partitioned and specifically marked portions were handed over to the respective parties notwithstanding the fact that both of them may be cultivating the respective portions i.e. the northern portion and southern portion respectively. This finding has been confirmed in the Second Appeal before this Court but even while deciding the Second Appeal it has not been held that the respondent no.2 or the original tenant Mr.Ashtekar was in cultivation of the land in northern portion of Survey No.91-A. In fact respondent no.2 himself had approached the Mamlatdar under Section 70(b) read with Section 4 of

the Tenancy Act and filed an application on 31/3/1962 and prayed for a declaration that he was a tenant within the meaning of the Tenancy Act in respect of the southern portion of Survey No.91-A. In this application he did not pray for similar declaration in respect of the entire land in Survey No.91-A and this itself would go to show that the respondent no.2 was aware about his possession over the land in the southern portion of Survey No.91-A. The landlords had submitted an application under Section 29 read with Section 15 of the Tenancy Act which was listed as Tenancy Case No.23 of 1965 in respect of the southern portion in Survey No.91-A and while dealing with the orders arising from the said application passed by the Mamlatdar and Special Deputy Collector, the Maharashtra Revenue Tribunal in Revision Application No.267 of 1967 clearly proceeded on the basis that the disputed land formed part of Survey Nos.91-A and 91-B including some portion of Survey No.91-A which was kept common between the landlords and the tenants. The Tribunal has not recorded a finding in its decision dated 31/7/1969 that the respondent no.2 was in possession or he was cultivating the entire land in Survey No.91-A.

9. This Court in Special Civil Application No.2589 of 1969 has referred to the earlier order dated 10/1/1962 passed by the Division Bench in Special Civil Application No.781 of 1961 and more particularly the following portion:

> "Any amounts sent by opponent No.2 on behalf of opponent No.1 shall be accepted by the petitioner without prejudice to any of his rights and/or contentions." [Opponent no.1 means present respondent no.2 and petitioner means the landlords.]
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> "Opponent No.1 is to be declared to be the tenant of only the southern portion of the land. It is also agreed between the parties that opponent No.2 should be regarded as the partner taken by Opponent No.1 and that he is in possession of the southern portion of the land with the consent of the petitioner".

In the judgment and order passed in Second Appeal No.98 of 1968 which was decided along with Second Appeal No.1606 of 1969 on 16th March 1974 it has been specifically observed :

"That Special Civil Application No.2589 of 1969 was decided by me on August 9, 1972 holding that Vishnu Barge was a tenant, that his tenancy was not terminated."

This observation was in respect of the southern portion of Survey No.91-A.

10. The executing Court also committed a manifest error in failing to note that the tenancy rights recognised in favour of the respondent no.2 were only in respect of the land (southern portion) in Survey No.91-A and these proceedings never related to the land in Survey No.91-B. In executing the decree held by the present petitioners there was no difficulty in considering the undisputed land in Survey No.91-B. This mixup by the executing Court in proceeding on the basis that the tenancy proceedings were in respect of the entire holding of the original land has resulted in an erroneous order which has been impugned in this petition and it was not permissible for the Court below to hold that the decree was unexecutable and to dispose/dismiss the Darkhast application on record on that ground.

11. In the premises this petition succeeds and the same is hereby allowed. The impugned order dated 22/4/1986 passed by the 6th Jt.Civil Judge, Senior Division, Pune in Special Darkahst Application No.84 of 1975 is hereby quashed and set aside and it is directed that the executing Court shall proceed further by restoring Special Darkhast Application No.84 of 1975. The said Darkhast shall be decided on merits as expeditiously as possible and in any case by 31st December 2006 and for the land under attachment as per the order dated 21/10/1972.

12. Mr.Gaikwad, the learned counsel for the respondent no.2 submitted an oral application for stay of this order for two months. The application is hereby rejected.

(B.H.MARLAPALLE,J.)